Supreme Court, U.S.
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No. 03-566

IN THE
Supreme Court of the United States

CROWN CORK & SEAL COMPANY
(DELAWARE), INC.

Petitioner,

v.

COMPTROLLER OF THE TREASURY,

Respondent.

On Petition for A Writ of Certiorari To The Court of Appeals of Maryland

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

GERALD LANGBAUM*
JOHN K. BARRY
Assistant Attorneys General
Goldstein Treasury Building
P.O. Box 466
Annapolis, Maryland 21204-0466
(410) 260-7808

Attorneys for Respondent
Comptroller of the Treasury

**Counsel of Record*

QUESTION PRESENTED

Did the Court of Appeals correctly hold that a corporation having no real economic substance has the requisite substantial nexus with Maryland under the Commerce Clause and the requisite minimum contacts with Maryland under the Due Process Clause to subject the corporation to the state income tax by virtue of the presence in Maryland of its operating parent and the use in Maryland by the parent of valuable intellectual property that is owned by the corporation and licensed to the parent and that generated substantial royalty income for the corporation from sales made by the parent in Maryland?

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STATEMENT OF THE CASE

A. Crown Delaware's Creation And Its So-Called Operation.

Crown Cork & Seal Company (Delaware), Inc. (hereinafter "Crown Delaware") was incorporated by its parent, Crown Cork & Seal Company, Inc. (hereinafter "Crown Parent") primarily for the purpose of "sheltering income from state taxation." (App. 38a). In exchange for all of Crown Delaware's stock, Crown Parent transferred to Crown Delaware 13 domestic patents and 16 trademarks and entered into an exclusive license agreement authorizing Crown Parent to utilize the assigned patents and trademarks. (App. 19a, 22a). As consideration for the right to use the patents and trademarks, Crown Parent agreed to pay Crown Delaware a royalty based on Crown Parent's sales. (App. 22a). On its tax returns filed in Maryland (and elsewhere), Crown Parent deducted the royalties paid as a business expense. Crown Delaware did not file corporation income tax returns in Maryland (App. 19a) and was exempt from tax in the only State in which it asserted it did business, Delaware.[1]

Crown Delaware took steps in an attempt to create a Delaware presence. (App. 22a). It contracted with a third party, Organization Services, Inc. (hereinafter OSI), a self described nexus service provider for Delaware holding companies. (App. 22a - 23a). In its literature describing the services that it performed, OSI emphasized a "*Caution!*" that a Delaware subsidiary must have substance to satisfy other states as to its situs with Delaware. (App. 23a) (emphasis in original). OSI provided its nexus services to Crown Delaware and approximately 400 other similar companies; as compensation, Crown Delaware paid OSI rent of $100 per month and a salary to OSI's president,

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[1] Delaware exempts from tax corporations whose sole income is from intangible sources, such as royalties earned on intellectual property. *See* Title 30, Delaware Code, §1902(b)(8.)

George Warren, of $200 per year. (App. 23a-24a). Crown Delaware hired additional OSI employees ostensibly to manage its daily operations; the total annual compensation paid to all such part-time employees averaged $600 per year. (App. 24a). The salary was paid to each employee once, annually, and the employees' responsibilities never involved intellectual property expertise (notwithstanding that management and control of these patents and trademarks was Crown Delaware's "purported function.") (App. 19a, 24a).

The royalties paid by Crown Parent to Crown Delaware averaged approximately 37 million dollars annually for the years 1990 through 1993. (App. 25a). Typically, toward the end of the calendar year, Mr. Warren, on behalf of Crown Delaware, sent Crown Parent a bill for the year's royalties; on the same day that the royalties were paid by Crown Parent to Crown Delaware, they were wired back to Crown Parent as a loan. The debt owed by Crown Parent to Crown Delaware increased each year by the approximate amount of the royalty, and no payments were ever made on the debt. As of December 31, 1993, the amount of the note receivable from Crown Parent on the books of Crown Delaware was greater than 163 million dollars. (Apx. 1)[2]. There were no loan agreements in existence describing the terms of repayment or the sanctions in the event of default. (App. 25a). Crown Parent annually paid Crown Delaware interest on the growing loan and took a tax deduction for the interest payments; the interest income received by Crown Delaware averaged more than 3 million dollars annually for the years 1990-1993 and was not taxed by Delaware. *See* note 1, *supra*. (Apx. 2-3).

The actual operating expenses incurred by Crown Delaware to generate its average annual revenues of approximately 37 million dollars was just over $2,000

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[2] The reference "Apx." is to the appendix to this brief in opposition.

annually. (App. 25a). Crown Delaware incurred virtually none of the usual expenses of a business operation such as meals and entertainment ($20 total over five years), telephone ($60 total over five years) and postage ($100 total over five years). Total travel costs for the five years were less than $7. (App. 26a). Notwithstanding that Crown Delaware's purported function was to manage and control its patents and trademarks, Crown Delaware incurred no legal fees associated with the patents and trademarks. (App. 19a, 26a).

Other structural oddities were present. Even though ownership of the patents and trademarks had been transferred to Crown Delaware, only Crown Parent – and not Crown Delaware – could license the intellectual property to a third party. (App. 26a). Similarly, after having relinquished ownership, Crown Parent continued to be responsible for maintaining and defending the validity and ownership of the intellectual property, as well as the general administrative duties of complying with all laws and regulations that related to them. (App. 26a).

In addition, there were numerous instances where corporate formalities were blurred, if not ignored. (App. 27a). For example, on one occasion in 1991, the annual royalty was paid to Crown Delaware and transferred back to Crown Parent 31 days *before* Crown Delaware billed Crown Parent for the royalty. (App. 25a). Several corporate documents reflected that officers of Crown Parent signed documents as officers of Crown Delaware when they were not such officers; Mr. Warren signed documents as secretary of Crown Delaware when he was not secretary; and the two corporate names and addresses were used interchangeably. (App. 27a). The explanation for all of these inconsistencies, from Crown Parent's general counsel, was that they were merely "screw-ups" or "mistakes." (App. 27a).

B. The Holding Of The Court Of Appeals.

The Court of Appeals concluded that "sheltering income from state taxation was the predominant reason for the creation of . . .Crown Delaware." (App. 38a.) Observing that Crown Delaware "had no real economic substance as [a] separate business entit[y]," the court noted that Crown Delaware was much like a domestic international sales corporation that existed only on paper except that it had "a touch of 'window dressing' designed to create an illusion of substance." (App. 38a.) The court also noted that Crown Delaware's part time employees, whose wages were "minuscule," were in reality employees of an independent nexus service company and that "[t]he so-called offices in Delaware were little more than mail drops." (App. 38a.) In addition, the court noted that no part of Crown Parent's operation regarding its trademarks changed with the creation of Crown Delaware and that Crown Delaware "did virtually nothing." (App. 38a.)

The Court of Appeals stated its full concurrence (App. 39a) with a decision of the Court of Special Appeals of Maryland holding that a domestic international sales corporation by its very nature (i.e., having "no tangible property or employees and [that] can only conduct its activity and do business through branches of its unitary affiliated parent") did business in those states in which its parent did business. *Comptroller v. Armco Export Corporation*, 82 Md. App. 429, 435, 572 A.2d 562, 566, *cert. denied,* 320 Md. 634, 579 A.2d 280 (1990), *cert. denied,* 498 U.S. 1088 (1991). (App. 35a-36a.) The court endorsed the view of the highest courts in two other states upholding "the application of state income tax laws with respect to a portion of the income of out-of-state subsidiaries having the sole function of owning their parents' trademarks." *Syms Corp. v. Commissioner of Revenue*, 436 Mass. 505, 506, 765 N.E.2d 758, 760 (2002) and *Geoffrey, Inc. v. South Carolina Tax Commission*, 313 S.C. 15, 19-20, 437 S.E.2d 13, 16, *cert. denied,* 510 U.S. 992 (1993). (App. 39a-42a.) The Court of Appeals

specifically held that "a portion of . . . Crown Delaware's income, based upon [its] parent corporation[']s[']Maryland business, is subject to Maryland income tax." (App. 43a.)

REASONS FOR DENYING THE WRIT

Crown Delaware's petition seeks review of the same Maryland Court of Appeals decision that this Court declined to review earlier this month, when a petition for certiorari was denied in *SYL v. Comptroller of the Treasury*, No. 03-335 (November 3, 2003).[3] Like Crown Delaware SYL also sought review on Commerce Clause grounds. Ten years ago, this Court similarly denied a petition for writ of certiorari in *Geoffrey v. State Tax Commission*, 313 S.C. 15, 437 S.E.2d 13, a case that presented the identical legal issue on substantively indistinguishable facts. There, as here (and as in *SYL*), a multistate corporation, doing business in the taxing state, incorporated a subsidiary in Delaware; transferred to that subsidiary its valuable intellectual property such as patents and trademarks; paid a substantial royalty to that subsidiary for the right to use the intellectual property, the royalty being measured as a percentage of the parent's sales; pervasively used that intellectual property to promote its business activities in the taxing state; and computed its taxes in the taxing state, taking a deduction for the royalties so paid. In all three instances, the subsidiary, having booked significant royalty income and incurred minimal expenses, did not file tax returns in the taxing state, asserting that it did business only in Delaware, which chose not to tax it. The Supreme Court of South Carolina, like the Court of Appeals of Maryland, rejected this corporate

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[3] SYL and Crown Delaware are unrelated corporations, each of which was assessed by the Comptroller and appealed to the Maryland Tax Court. The two cases were tried separately in the Tax Court and briefed and argued separately in the Court of Appeals, which issued one opinion, addressing both cases.

sleight of hand and held that the subsidiary was doing business in the taxing state and was thus subject to a properly apportioned income tax imposed by the taxing state.

Given the transparent nature of such entities as nothing more than bookkeeping creations designed solely to save taxes, it is clear, as it was when the court denied similar petitions in *Geoffrey* a decade ago and again less than two weeks ago in *SYL*, that the petition here presents no significant issue warranting this Court's plenary review.

I. THE DECISION BELOW WAS A ROUTINE AND PROPER APPLICATION OF THIS COURT'S DECISIONS INTERPRETING THE COMMERCE CLAUSE.

A. Nexus Is Provided By The Activities of Affiliates.

The limitations imposed by the Commerce Clause on a state's right to tax those engaged in interstate commerce were set forth by this Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977): the tax will be sustained if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." In *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), this Court articulated the different purposes served by the Due Process and Commerce Clauses insofar as they limit state taxation, but did not change any of the four prongs of the *Complete Auto* Commerce Clause inquiry.

Quill involved a use tax collection obligation imposed on a mail order vendor. Noting that it had required a physical presence in the taxing state as a prerequisite for imposition of such an obligation in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), this Court in *Quill* endorsed the benefits of "settled expectations" flowing from a "bright-line rule in the area of

sales and use taxes"and applied the rule of *stare decisis*, declining to eliminate the physical presence requirement for a use tax collection obligation (even while noting that "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today".)[4] *Quill*, 504 U.S. at 311, 316-317. This Court twice made it clear that it had not previously extended – and was not then extending – the physical presence rule to any other type of tax: "we have not, in our review of other types of taxes, articulated the same physical-presence requirement that *Bellas Hess* established for sales and use taxes. . ." and "in our cases subsequent to *Bellas Hess* and concerning other types of taxes we have not adopted a similar bright-line, physical-presence requirement...." *Quill*, 504 U.S. at 314 and 317.

Thus, *Quill* changed no rules regarding a physical presence requirement and declined to impose such a requirement for income taxes (or any taxes other than sales and use tax cases.) This Court has found constitutional nexus, in the income tax context, absent the taxpayer's physical presence. *See Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 483 U.S. 232, 250 (1987) (nexus found to be present when an out-of-state corporation is represented in the taxing state by an independent contractor: "the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales.") The primary authority for this post - *National Bellas Hess* decision was *Scripto, Inc. v. Carson*, 362 U.S.

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[4] In their treatise on state taxation, the Hellersteins referred to this Court's "lukewarm endorsement of the physical - presence standard of nexus" and characterized the Court as being "almost apologetic in its defense of the old rule." Hellerstein and Hellerstein, *State Taxation* Vol. I (3rd ed.), Par. 6.02[2].

207 (1960), a use tax collection case in which a company's presence in a state through wholesalers and jobbers but with no regular employees (or offices) was sufficient to impose a use tax collection obligation.

Tyler Pipe and *Scripto* underscore that both the decision below and the precedent on which its legal underpinnings rested, *Armco Export*, were correct and unremarkable. It follows both logically and inevitably that if a corporation has substantial nexus by virtue of a presence in the state through *independent* contractors, it certainly has substantial nexus when its presence is in the form of its unitary parent acting on its behalf. Simply stated, Crown Delaware owned valuable patents and trademarks. Crown Parent utilized those patents and trademarks in Maryland (and elsewhere) to generate sales that produced the income to Crown Delaware in question. Paraphrasing this Court's analysis in *Tyler Pipe*, Crown Parent's activities in Maryland were the basis on which a market in Maryland was established and maintained, thereby generating royalty income for Crown Delaware.

Moreover, these cases are entirely consistent with the "substantial nexus" requirement of *Complete Auto* which mandates that the tax be applied to an *activity* with a substantial nexus with the taxing state. That activity in *Tyler Pipe* and *Scripto* was the making of sales in the taxing state, notwithstanding that they were made by an independent contractor. It is no different in this matter: the "activity" having a "substantial nexus" with Maryland is Crown Parent's use of Crown Delaware's intellectual property to make the sales in Maryland that produced the royalties for Crown Delaware that Maryland seeks to tax, on a fairly apportioned basis.

B. Nexus Is Provided By The Presence of Intangible Property.

One year after *Quill*, the Supreme Court of South Carolina decided *Geoffrey*. Responding to Geoffrey's argument that there was no substantial nexus because it was

not physically present in South Carolina, the court observed that this Court, in *Quill*, had recently reaffirmed the vitality of the physical presence requirement "as to sales and use taxes [but] that the physical presence requirement had not been extended to other types of taxes." *Geoffrey*, 313 S.C. at 23, n.4, 437 S.E.2d at 18, n.4. The court continued: "It is well-settled that the taxpayer need not have a tangible, physical presence in a state for income to be taxable there. The presence of intangible property alone is sufficient to establish nexus." *Id.*, 313 S.C. at 23, 437 S.E.2d at 18. After citing the Hellersteins for the proposition that "any corporation that regularly exploits the markets of a state should be subject to its jurisdiction to impose an income tax even though not physically present,"[5] the court held that "by licensing intangibles for use in this State and deriving income from their use here, Geoffrey has a 'substantial nexus' with South Carolina." *Id.*, 313 S.C. at 23-24, 437 S.E.2d at 18.

Two points regarding *Geoffrey* warrant mention. First, this Court did not deem it worthy of further review. Second, even some of its critics agree that it reached the right result. Thus, the Hellersteins observed that "South Carolina had a strong claim that Geoffrey's income was earned in part in South Carolina and that there was no constitutional bar to South Carolina effectively taxing such income even if it lacked personal jurisdiction over Geoffrey." Hellerstein and Hellerstein, *State Taxation* (3rd ed.) par. 6.11 [2]. Their reasoning strongly supports the correctness of the conclusion of the Court of Appeals in this case: "Since Geoffrey earned income every time Toys "R" Us made a sale in South Carolina, it is hard to resist the conclusion that, as a matter of constitutional law, South Carolina had a sufficient connection with such income to tax at least an apportioned share of it." *Id.* at par. 6.11[2],

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[5] Hellerstein and Hellerstein, *State Taxation* (2nd ed. 1992) Par. 6.08.

n.150.

Ultimately, the determinative question is *whether* business is conducted in the taxing state, not how it is conducted. For paper entities such as Crown Delaware, there can be no doubt that they conduct their business – that is, earn their royalties – wherever their operational parents act.

C. Physical Presence Is Not A Prerequisite Under The Commerce Clause For Imposition Of A State Income Tax, Particularly For An Entity Like Crown Delaware That Has No Impact On The National Economy.

This Court has long recognized the authority of a state to impose an income tax "upon incomes accruing to nonresidents from their property or business within the state." *Shaffer v. Carter*, 252 U.S. 37, 52 (1920.) Similarly, a "taxpayer who is domiciled in one state but carries on business in another is subject to a tax there measured by the value of the intangibles used in his business." *Curry v. McCanless,* 307 U.S. 357, 368 (1939). The absence of the physical presence of the nonresident (*Shaffer*) and the conducting of a business through the presence of intangibles, rather than tangibles (*Curry*), were not viewed by this Court as barriers to State income taxation. In the intervening years, *Geoffrey* is not the only case in which this Court has declined an invitation to review a state court decision addressing the question of a physical presence requirement to impose a tax on income. *See Couchot v. State Lottery Commission*, 74 Ohio St.3d. 417, 659 N.E.2d 1225, *cert. denied*, 519 U.S. 810 (1996) (taxpayer's petition); *J.C.Penney National Bank v. Johnson*, 19 S.W.3d 831 (Tenn. Ct. App. 1999), *cert. denied*, 531 U.S. 927 (2000) (state's petition.) In each of these cases, this Court has not felt the issue to be worthy of further review.

This Court's clear articulation in *Quill* of the fundamental purpose underlying the Commerce Clause

explains why this Court has not felt the need, post-*Quill*, to address the question whether a physical presence is required as a prerequisite for imposition of a state income tax. The substantial nexus requirement embedded in the Commerce Clause is directed at "structural concerns about the effects of state regulation on the national economy." *Quill*, 504 U.S. at 312. It is a "means for limiting state burdens on interstate commerce." *Id.*, at 313. No undue burden on interstate commerce results from the imposition of a fairly apportioned income tax on a wholly owned subsidiary by a state in which the parent is subject to tax, which tax is measured by receipts from sales of the parent corporation and determined on the same facts as applied to the parent's tax liability. This is particularly true where, as here, the so-called "activities" of the subsidiary earning the income are, in reality, the activities of the parent. The taxation of the subsidiary does not impede a separate business enterprise; it merely prevents avoidance of tax by the business enterprise. The Crown Delawares of the world do not involve additional capital expenditures or the exploitation of new markets; they merely realign – and reduce – the ultimate state tax burden otherwise imposed on the existing capital expenditures and existing markets. Maryland's taxation of Crown Delaware should be properly viewed as an effort to recapture lost tax revenue caused by an admittedly clever program of shifting income to states that choose not to tax it; such recapture does not cause any burden on interstate commerce, much less an undue burden.

As the twentieth century drew to a close, this Court on three occasions declined invitations to pass upon the question posed here by Crown Delaware. No reason has subsequently emerged to warrant granting Crown Delaware's petition. To the contrary, it is quite clear that further consideration by this Court is not necessary to establish that which the Court of Appeals of Maryland recognized: that the realities of the marketplace at the onset of the twenty-first century render a physical presence obsolete as a threshold for constitutional nexus for the

imposition of a tax on income. In the words of the Ninth Circuit in an analogous case involving jurisdiction:

> It is increasingly clear that modern businesses no longer require an actual physical presence in a state in order to engage in commercial activity there. With the advent of "e-commerce," businesses may set up shop, so to speak, without ever actually setting foot in the state where they intend to sell their wares. Our conceptions of jurisdiction must be flexible enough to respond to the realities of the modern marketplace.

Gator.Com Corp. v. L.L. Bean, Inc., 341 F.3d 1072, 1081 (9th Cir. 2003). The Court of Appeals of Maryland properly recognized those realities in dealing with a precursor to e-commerce: a bookkeeping entity that, like its electronic cousin, does business in and generates income from numerous states without establishing a physical presence there. The Commerce Clause does not bar those states, including Maryland, from taxing a fairly apportioned share of such income.

II. THE DECISION BELOW WAS A ROUTINE AND PROPER APPLICATION OF THIS COURT'S DECISIONS INTERPRETING THE DUE PROCESS CLAUSE.

The Due Process Clause

> "requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax,"...and that the "income attributed to the State for tax purposes must be rationally related to 'values connected to the taxing state.'"

Quill, 504 U.S. at 306 (quoting *Miller Brothers v. Maryland*, 347 U.S. 340, 344-45 (1954) and *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978)). Though the Due Process Clause, like the Commerce Clause, limits a state's power to tax, its underlying concerns and policies are

different. "Due process centrally concerns the fundamental fairness of governmental activity...whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him." *Quill*, 504 U.S. at 312. With its roots in the jurisdictional "minimum contacts" principle emanating from this Court's decision in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the limitations imposed on a state's taxing power under the Due Process Clause are less demanding than those imposed by the Commerce Clause. Thus, even while affirming the Commerce Clause impediment to a state's imposition of a sales and use tax collection obligation on a vendor not physically present in the state, this Court held that the Due Process Clause imposed no such impediment. *Quill*, 504 U.S. at 308 ("The requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing state.") *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (absence of physical presence not a bar to in personam jurisdiction under due process principles for a foreign corporation that purposefully avails itself of the benefits of the economic marketplace in the taxing state).

Crown Delaware's presence in Maryland far exceeds minimum contacts. Its valuable patents and trademarks are used in Maryland on a daily basis by its parent, generating significant sales revenue for Crown Parent and significant royalty revenue for Crown Delaware. By express contractual design, Crown Delaware earned a royalty with every sale made in Maryland by Crown Parent. Crown Delaware could only act through the efforts of its parent – a parent with substantial marketing activities and three manufacturing plants in Maryland. (App. 19a-20a). As noted above, due process equates to fairness. There is simply no unfairness in permitting a state to impose its income tax on a corporation earning tens of millions of dollars in royalty income as a result of activities in the taxing state by its unitary parent utilizing the valuable patents and trademarks owned by the corporation and

licensed to the parent. Indeed, the only unfairness would be to allow a corporation to defeat its proper state income tax liability by the type of corporate sleight of hand typified by Crown Delaware and its parent.[6] As this Court has unequivocally held that the due process concept of fairness does not require a corporation's physical presence in a state in order for the corporation to be subject to a state tax, Crown Delaware's due process argument raises old and settled questions that do not warrant further review.

III. NO CONSTITUTIONAL QUESTION IS RAISED BY THE COMPTROLLER'S APPORTIONMENT METHOD.

Acting pursuant to a statute authorizing the Comptroller to alter the standard three factor formula "if circumstances warrant...[t]o reflect clearly the income allocable to Maryland" (Md. Code Ann., Tax-General §10-402, App. 123a-125a), and recognizing the unusual nature of Crown Delaware, which was little more than a paper entity that could only act through its corporate parent, the Comptroller applied to the taxable income of Crown Delaware the apportionment formula of Crown Parent. As set forth in its brief below, Crown Delaware's objection to this approach has been that the Comptroller is effectively mandating a combined return: "In requiring that [Crown Delaware] file corporate income tax returns based on the apportionment

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[6] The Supreme Judicial Court of Massachusetts, in reviewing a virtually identical arrangement, applied the "sham transaction" doctrine to disallow the royalty deductions paid by the parent to the subsidiary. *Syms v. Commissioner of Revenue*, 436 Mass. at 509-511, 765 N.E.2d at 762-764. This doctrine requires invalidation of transactions motivated by nothing more than obtaining a tax benefit and structured so as to completely avoid economic risk. *Horn v. Commissioner of Internal Revenue*, 968 F.2d 1229, 1236 (D.C. Cir. 1992); *Gregory v. Helvering*, 293 U.S. 465 (1935).

factors of Crown Parent, the [Comptroller] is requiring [Crown Delaware] and Crown Parent to apportion their income as if they filed a combined return, and is thus attempting to create an exception to the clear dictates of Maryland law by administrative fiat." (App. 223a).

Crown Delaware concedes, as it must, that the Constitution does not prohibit a combined return. (Pet. at 15-16, citing *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159 (1983) and *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298 (1994)). Thus, to the extent that the apportionment method utilized by the Comptroller produces a result similar to that which would be produced by a combined report, there is no basis for a constitutional objection that warrants this Court's review.[7]

Moreover, the law has been settled for decades that a person who attacks an apportionment formula "carries a distinct burden of showing by 'clear and cogent evidence' that it results in extraterritorial values being taxed." *Butler Brothers v. McColgan*, 315 U.S. 501, 507 (1942) (citations omitted). Crown Delaware has presented no such evidence.

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[7] As a matter of state law, the Maryland courts have spoken unequivocally, endorsing the Comptroller's right to modify the apportionment formula when necessary to prevent a distortion of income in the case of a corporation (such as a domestic international sales corporation or a Delaware holding company like Crown Delaware) that is only capable of acting through its operational affiliate. *See Ward Europa v. Comptroller*, 66 Md. App. 332, 346, 503 A.2d 1371, 1378 (1986).

CONCLUSION

For the reasons stated, Crown Cork & Seal Company (Delaware), Inc.'s Petition for Writ of Certiorari should be denied.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

GERALD LANGBAUM*
JOHN K. BARRY
Assistant Attorneys General

Goldstein Treasury Building
P.O. Box 466
Annapolis, Maryland 21401-0466
(410) 260-7808

Attorneys for Respondent
Comptroller of the Treasury

**Counsel of Record*

CROWN, CORK AND SEAL
COMPANY (DELAWARE), INC.
Trial Balance
December 31, 1993

Cash-Manufacturers Hanover	3,146.13	
Interest Receivable	3,979,261.00	
Royalty Receivable	0.00	
Intangibles	544,830.00	
Accumulated Amortization		154,958.00
Intercompany		56,598,699.94
Note Receivable – C.C.S.	163,742,181.80	
Accounts Payable		0.00
Capital Stock Common		100.00
Capital Surplus		544,830.00
Retained Earnings Prior		84,892,263.24
Retained Earnings Current		0.00
Royalty Income – Other		0.00
Royalty Income – C C S		35,566,321.00
Royalty Income – S. Africa		0.00
Interest Income		0.00
Interest Income – C.C.S.		3,979,261.00
Wages	843.66	
Payroll Tax	79.72	
Rent	1,200.00	
Postage & Copy	26.88	
Telephone	36.43	
Office Expense	0.00	
Other Taxes	46.00	
Legal & Accounting	65.00	
Meals & Entertainment – 80% deductible	20.00	
Travel	3.41	
Bank Charges	279.47	
Amortization Expense	30,000.00	
Provisions for Federal Income Tax	13,434,413.68	
	181,736,433.18	181,736,433.18

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Excerpts from Stipulation of Facts

11. Crown assigned thirteen domestic patents and sixteen trademarks to Petitioner on June 13, 1989.

12. Upon formation, Petitioner contracted with Organization Services, Inc., to provide certain corporate, administrative and accounting services.

13. Petitioner's total gross income for the Taxable Period consisted of the following as shown on the attached chart:

CROWN CORK & SEAL (DELAWARE)
SUMMARY OF INCOME & EXPENSES
(Per Crown's Income Statements)

	1989	1990	1991	1992	1993
Income					
Royalty	16,200,000.00	30,000,000.00	34,226,000.00	36,729,506.48	35,566,321.00
Royalty-South Africa	3,600.00	792,936.27	524,407.00	722,493.52	
Interest	49,500.00	1,073,557.00	3,177,541.00	5,256,762.80	3,979,261.00
Interest (CCS)					
Total Income	16,253,100.00	31,866,493.27	37,927,948.00	42,708,762.80	39,545,582.00

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